Office - Supreme Court, U.S.
FILED
NOV 9 1982
ALEXANDER L. STEVAS,
CLERK

82 -890

NO.

In the Supreme Court of the United States

OCTOBER TERM, 1982

CITY OF NEW ORLEANS
and
DAVID MICHELL

versus

JOEL W. MARTIN

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

SALVADOR ANZELMO
CITY ATTORNEY FOR THE
CITY OF NEW ORLEANS

GALEN S. BROWN
DEPUTY CITY ATTORNEY
1300 PERDIDO STREET
ROOM 2W23 - CITY HALL
NEW ORLEANS, LOUISIANA 70112
TELEPHONE: (504) 586-4651

COUNSEL FOR PETITIONERS

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

QUESTION PRESENTED FOR REVIEW

May a District Court of the United States, without committing prejudicial error, give a mere general negligence charge and deny a defendant's request for a jury charge on the doctrine of "sudden emergency", where the doctrine is recognized as a defense by substantive state law of the state in which the District Court sits and the "sudden emergency" issue has been fairly raised by the evidence as defendant's principal defense?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED FOR REVIEW i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iii
OPINIONS BELOW 1
JURISDICTION 2
STATEMENT OF THE CASE 2
ARGUMENT 6
I. PRELIMINARY SUMMARY 6
II. THE SUDDEN EMERGENCY ISSUE 7
CERTIFICATE OF SERVICE 16
APPENDIX A A-1
APPENDIX B A-27

TABLE OF AUTHORITIES

JUDICIAL OPINIONS **Page**

Bautista v. Maryland Casualty Co.,
201 So.2d 122 (La. App. 4th. Cir.) 10

Bolden v. Kansas City Southern Railway Co.,
468 F.2d 580 (5th Cir. 1972) 11

Carney v. State Farm Mutual Automobile Ins. Co.,
335 So.2d 759 (La. App. 1st. Cir. 1976) 9

Cavallaro v. Williams,
530 F.2d 473 (3rd. Cir. 1975) 14

Chandler v. Edward W. Long, Inc.,
623 F.2d 1139 (6th Cir. 1980) 14

City Auto Wreckers, Inc. v. Wright,
346 So.2d 873 (La. App. 4th Cir. 1977) 8

Commercial Union Ins. Co. v. Stidom,
408 So.2d 285 (La. App. 2d. Cir. 1981) 8

Dean v. Travelers Ins. Co.,
171 So.2d 708 (La. App. 4th. Cir. 1965) 10

Erie Railroad Co. v. Tompkins,
304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) 7

Fontana v. State Farm Mutual Automobile Ins. Co.,
173 So.2d 284 (La. App. 3rd. Cir. 1965) 13

Guaranty Trust Co. of New York v. York,
326 U.S. 99, 63 S.Ct. 1464, 89 L.Ed. 2079,
160 A.L.R. 1231 (1945) 7

Hasselbrink v. Spellman,
246 F.2d 34 (6th Cir. 1957) 14

Heerman v. Burke,
266 F.2d 935 (8th Cir. 1959) 14

Hickman v. Southern Pacific Transport. Co.,
262 La. 102, 262 So.385, 389 (La. 1972) 9

Hopkins v. Metcalf,
435 F.2d 123 (10th Cir. 1970) 10, 14

Jackson v. Indiana Lumbermen's Mutual Ins. Co.,
175 So.2d 349 (La. App. 2d. Cir. 1965).....10

Johnson v. State Farm Mutual Ins. Co.,
345 So.2d 1277 (La. App. 3rd. Cir. 1977).....9

Jones v. Fontenot,
341 So.2d 620 (La. App. 4th Cir. 1977).....9

Kaplan v. Missouri Pacific Railroad Co.,
409 So.2d 298 (La. App. 3d. Cir. 1981).....8

Lind v. Aetna Casualty and Surety Co.,
374 F.2d 377 (5th Cir. 1967).....11

Long v. Hank,
457 F.2d 40 (10th Cir. 1972).....14

Marshall v. Insthmian Lines, Inc.,
334 F.2d 131 (5th Cir. 1964).....11

McCrory v. Rochester,
398 So.2d 1115 (La. 1981).....8

McKenzie v. Nationwide Mutual Ins. Co.,
363 So.2d 1340 (La. App. 3rd. Cir. 1978).....8

Mitchell v. Fowler,
295 So.2d 41 (La. App. 4th. Cir. 1974).....9

New York Trust Co. v. Eisner,
256 U.S. 345, 349, 41 S.Ct. 506, 507,
65 L.Ed. 963 (1921).....12

Noland v. Liberty Mutual Ins. Co.,
232 La. 569, 94 So.2d 67 (La. 1957).....9

Paramount Film Distributing Corp. v. Applebaum,
217 F.2d 101 (5th Cir. 1954).....10

Pollock v. Koehring Co.,
540 F.2d 425 (9th Cir. 1976).....10

Robertson v. Tran's,
393 So.2d 304 (La. App. 1st. Cir. 1980).....8

Rodgers v. Missouri Pacific Railroay Co.,
405 So.2d 57 (La. App. 3d. Cir. 1981).....8

Security Timber and Land Co. v. Reed,
398 So.2d 174 (La. App. 3rd. Cir. 1981).....8

Stains v. Jones,
500 F.2d 1233 (8th Cir. 1974) 14

Stansbury v. Hover,
366 So.2d 918 (La. App. 1st. Cir. 1978) 8

United States v. Goss,
650 F.2d 1336 (5th Cir. 1981) 11

United States v. Lewis,
592 F.2d 1282 (5th Cir. 1979) 11

Wessinger v. Overton,
339 So.2d 1272 (La. App. 1st. Cir. 1976) 9

STATUTES AND RULES

28 U.S.C. 1254(1) 2

Rule 51, Federal Rules of Civil Procedure 7

Supreme Court Rule 17 6

SECONDARY AUTHORITIES

Comment, 5 La.L.Rev. 432 (1943) 8

Malone and Guerry, Studies in Louisiana
Torts Law (1970) 8

Prosser, Handbook of the Law of Torts,
4th Edition (1971) 7

Stone, 12 La. Civil Law Treatise
Tort Doctrine §273, 278 8

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

THE CITY OF NEW ORLEANS
and
DAVID MICHELL

versus

JOEL W. MARTIN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioners, the City of New Orleans and David Michell, request that a Writ of Certiorari be issued to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit rendered in these proceedings.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, (Appendix A, *infra*) is reported at 678 F.2d 1321. The dissenting opinion of Garwood, Circuit Judge, is reported at 678 F.2d 1327. Petitioners application for rehearing was denied on August 11, 1982.

JURISDICTION

(i) The decision of the United States Court of Appeals for the Fifth Circuit of which petitioners seek review was rendered on June 25, 1982.

(ii) The order of the United States Court of Appeals for the Fifth Circuit denying petitioners' request for a rehearing was rendered on August 11, 1982.

(iii) The jurisdiction of this Honorable Court is invoked under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

Plaintiff Joel W. Martin filed suit in the United States District Court for the Eastern District of Louisiana against the City of New Orleans and its employee, Police Officer David Michell, for injuries sustained when the plaintiff was accidentally shot by Officer Michell while Michell was attempting to apprehend the driver of a vehicle which had struck a mounted police officer and had almost run over Michell, after refusing the officer's order to stop. Jurisdiction was based upon diversity of citizenship of the parties.

The Court of Appeals' opinion summarized the evidence at trial:

> On the evening of October 5, 1979, Officer Michell had been patrolling the French Quarter. He received a report over his radio informing him that a late model red Pontiac was careening

through the Quarter and had just struck a mounted policeman. Moments later Michell was at the intersection of Bourbon and Conti Streets when he noticed a red Pontiac proceeding recklessly down Conti. The vehicle nearly hit another policeman, Robert Williams, several pedestrians, and Officer Michell. The Pontiac continued down Conti and then turned right at the next corner onto Royal street. Anticipating that the driver would take a route around the block, Michell ran up Bourbon Street toward Bienville Street to await the return of the Pontiac. As Michell had guessed, the vehicle turned right from Royal onto Bienville and headed back toward Bourbon Street. Standing on Bienville, just before the Bourbon Street intersection, Officer Michell, by gesture and by standing in the street, ordered the driver of the Pontiac to halt. The driver ignored Michell and continued straight ahead almost running him down. At this point in the story, Michell's account of the subsequent events differs from the account given by witnesses for Martin.

Michell testified that he jumped out of the car's path and ran around to the passenger side of the vehicle. When he had observed the Pontiac earlier, Michell thought he had seen two people in the car, but now he saw the driver only. He claimed that he then drew his revolver, approached the front passenger side door, and leaned into the window to see whether the other person was hiding in the back seat. The driver grabbed Michell's revolver and in their struggle, the gun went off.

Betsy Buie and Judy Moscovitc, two of Martin's companions that evening, were standing on Bourbon Street at the Bienville Street intersection just behind the Bourbon Street barricade when

the incident took place. Although they were on the driver's side of the Pontiac, they testified that because they were behind the car, they could see clearly everything that happened on the passenger side. They contended that Michell approached the passenger side, drew his revolver, and using both hands, fired into the open window of the car. They stated unequivocally that Michell was standing completely outside of the car and that at no time did he lean into the car.

After the shot was fired, Martin grabbed the back of his head and sank to his knees. His testimony at trial indicated that at first he did not realize what had happened; he thought he might have been struck by a blunt object. But, almost instantly he was bleeding profusely. His companions rushed over to help him, but no one was able to stop the bleeding. A few minutes later, he was helped into a police squad car and taken to Charity Hospital.

Doctors at the hospital found that he had been shot and that the bullet and several bullet fragments had lodged in the soft tissue at the base of Martin's head and top of his neck. Because it was so close to the spinal cord, the doctors decided it would be too dangerous to remove the bullet. Martin had no other symptoms or complications at that time and was released from the hospital three days later.

Since the incident, Martin has experienced only minimal physical discomfort. Occasionally his neck becomes tired and sore when he remains in one position for a long time. He testified that he continues to suffer emotionally because he is constantly aware of the bullet's presence, and he fears the possibility of future complications. Two neurosurgeons who had examined Martin testi-

fied as to the extent of his injuries and his prognosis. Both testified that Martin's injury was healing well without complications. Because the bullet and its fragments remained in his neck, however, there would always be a risk of complications such as infection, arteriovenous fistula, and increased pain. If the bullet or fragments migrated to the spinal cord, Martin could become partially or totally paralyzed. Corrective surgery for any of these conditions would be dangerous and expensive. The doctors concluded that while the chance that Martin would experience these complications was small, the consequences were serious. 678 F.2d at 1323-4.

The defendants-petitioners requested a jury instruction on the Louisiana doctrine of "sudden emergency." The doctrine had been the "centerpiece of the defense", 678 F.2d at 1329 and was amply supported by the evidence; nonetheless the request was denied, and the case was submitted to the jury on a general "boilerplate" negligence charge. Defendants-petitioners urged a reasonable objection to the charge as given.

After submission the jury inquired, by a note from its foreman, whether Police Officer Michell might in the future be subjected to any criminal liabilities—such as prosecution for murder—if the remote possibilities of future medical complications became actualities. The Court replied that the panel should ignore the possibility of future criminal liability. Thereafter, the jury returned its responses to three interrogatories, finding defendant Michell negligent, finding his negligence the proximate

cause of Martin's injuries, and awarding damages of $500,000.00. Judgment was entered on the verdict. Defendants-petitioners' timely motions for a new trial or remittitur were denied.

Thereafter, an appeal was taken to the United States Court of Appeals, Fifth Circuit, complaining that the trial court erred in refusing the requested jury charge on its principal defense and that the award, being punitive, speculative, and excessive, was not permissible under Louisiana Law.

The panel of the Court of Appeals affirmed, with one circuit judge vigorously dissenting on the "sudden emergency" issue, citing prior decisions of the Fifth Circuit and numerous conflicting opinions of other circuits. An application for rehearing *en banc* was denied.

ARGUMENT

I. PRELIMINARY SUMMARY

Special and important reasons call for the issuance of a writ of certiorari in this case (Rule 17). The Court of Appeals' decision that there was no error in the District Court's refusal to give a special instruction on "sudden emergency" (although that issue was raised by the evidence as defendants' principal defense and is an integral part of Louisiana negligence law) is in conflict with the decisions of several other circuits.

II. THE "SUDDEN EMERGENCY" ISSUE

The jury charge provided for by Rule 51 of the Federal Rules of Civil Procedure is no mere flourish in the conduct of a jury trial. It is the crucial act of the judge by which law is joined to particular facts. It is the touchstone by which a jury becomes a jury rather than an unfettered committee of arbitrators. In a diversity suit, in which the law of the state in which the District Court sits provides the rule of decision on all out-come determinative issues, *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938); *Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 63 S.Ct. 1464, 89 L.Ed. 2079, 160 A.L.R. 1231 (1945). A defective or inadequate jury charge may, in effect, abrogate entire doctrines enshrined in the substantive law of the state. Petitioners submit that such an abrogation of state law has occurred in these proceedings.

Circuit Judge Garwood's dissent in the intermediate court noted that "sudden emergency is an old doctrine almost universally accepted in negligence cases by the courts of Louisiana and the rest of our nation..."[1] 678 F.2d at 1329. Prosser, Handbook of the Law of Torts, 4th Edition (1971), at page 166, calls the doctrine (which he treats at pages 168 *et seq.*) one of those "problems whose fre-

[1] Many of the state courts have held the failure to instruct a jury on the doctrine to be reversible error. See Annotation, Instructions on Sudden Emergency in Motor Vehicle Cases, 80 A.L.R.2d.5. (Note that many counts have also found reversible error in the *giving* of a sudden emergency instruction in factually inappropriate cases—further indication that the state courts do not regard the doctrine as a mere paraphrase of the general negligence rules.)

quent appearance indicates that they are of sufficient importance to call for special notice." The law of Louisiana has given the problem of sudden emergencies such "special notice." The premier commentator on Louisiana tort law has stated that "...it becomes very important that the judge or jury be presented with all the circumstances which produced or affected the situation. These include... (E). A sudden emergency requiring quick action." Stone, 12 La. Civil Law Treatise, Tort Doctrine, §273, 278. See also Comment, 5 La.L.Rev. 432 (1943), excerpted in Malone and Guerry, Studies in Louisiana Torts Law (1970), p.612.

The most recent expressions of Louisiana courts on "sudden emergency" (which is characterized as a "doctrine [which] provides a defense or exception"), *Kaplan v. Missouri Pacific Railroad Co.*, 409 So.2d 298 (La. App. 3d. Cir. 1981) at 307, *Commercial Union Ins. Co. v. Stidom*, 408 So.2d 285 (La. App. 2d. Cir. 1981) are merely the last of a long line of cases by which the *jurisprudence constante* of the state has given the sudden emergency doctrine, as a "doctrine" and denominated as such, a special place in the substantive law of negligence. See, e.g., *Rodgers v. Missouri Pacific Railroad Co.*, 405 So.2d 57 (La. App. 3d. Cir. 1981); *McCrory v. Rochester*, 398 So.2d 1115 (La. 1981); *Security Timber and Land Co. v. Reed*, 398 So.2d 174 (La. App. 3d. Cir. 1981); *Robertson v. Tran's*, 393 So.2d 304 (La. App. 1st. Cir. 1980); *Stansbury v. Hover*, 366 So.2d 918 (La. App. 1st Cir. 1978); *McKenzie v. Nationwide Mutual Ins. Co.*, 363 So.2d 1340 (La. App. 3rd Cir. 1978); *City Auto Wreckers, Inc. v. Wright*, 346 So.2d 873 (La.

App. 4th Cir. 1977); *Johnson v. State Farm Mutual Ins. Co.*, 345 So.2d 1277 (La. App. 3rd Cir. 1977); *Jones v. Fontenot*, 341 So.2d 620 (La. App. 4th Cir. 1977); *Wessinger v. Overton*, 339 So.2d 1272 (La. App. 1st Cir. 1976); *Carney v. State Farm Mutual Automobile Ins. Co.*, 335 So.2d 759 (La. App. 1st Cir. 1976); *Mitchell v. Fowler*, 295 So.2d 41 (La. App. 4th Cir. 1974); *Noland v. Liberty Mutual Ins. Co.*, 232 La. 569, 94 So.2d 67 (La. 1957). In at least one case, *London v. Ryan*, 349 So.2d 1334 (La. App. 1st Cir. 1977), *writ denied*, 351 So.2d 171 (La. 1977), a Louisiana court applied the sudden emergency doctrine to an accidental shooting by a police officer.

The gist of the Louisiana doctrine was stated by Defendants' (petitioners') Requested Jury Charge No. 7, a verbatim excerpt from *Hickman v. Southern Pacific Transport. Co.*, 262 La. 102, 262 So.385, 389 (La. 1972):

> One who suddenly finds himself in a position of imminent peril, without sufficient time to consider and weigh all of the circumstances or best means that may be adopted to avoid an impending danger, is not guilty of negligence if he fails to adopt what subsequently and upon reflection may appear to have been a better method, unless the emergency in which he finds himself is brought by his own negligence.
>
> Defendant's Requested Jury Charge No. 7. (See also 65A C.J.S. Negligence § 123; 57 Am. Jr. 2d., negligence § 90 cited by the Louisiana Supreme Court).

In Hickman, as in all the Louisiana cases above cited, the principle stated in Defendant's Jury Charge No. 7 was applied as a "doctrine", as a "rule" of law determinative of the outcome of litigation, and not as merely a more emphatic consideration of one of the circumstances of the case; as the Court of Appeals suggested in the case *sub judice*, at 578 F.2d 1325.[2]

The giving or denial of a jury instruction and the evaluation of its prejudicial or harmless character are matters of federal law, *Hopkins v. Metcalf*, 435 F.2d 123 (10th Cir. 1970); *Pollock v. Koehring Co.*, 540 F.2d. 425 (9th Cir. 1976); but in a diversity case, the substance of the instructions is determined by state law. *Hopkins v. Metcalf, supra.* Since the sudden emergency rule is "an element of the law of negligence" in Louisiana, *Bautista v. Maryland Casualty Co.*, 201 So.2d 122, at 124 (La. App. 4th Cir.), the doctrine was a proper item for inclusion in the substance of defendants' requested jury charge. And since the request was properly made and supported by the evidence, defendants-petitioners were clearly entitled to it. *Paramount Film Distributing Corp. v. Applebaum*, 217 F.2d 101 (5th Cir. 1954), *cert. denied*, 349 U.S. 961, 75 S.Ct. 892, 99 L.Ed. 1284 (1955). A District Court refusing to give such an ac-

[2] *Dean v. Travelers Ins. Co.*, 171 So.2d 708 (La. App. 4th Cir. 1965) which the Court of Appeals cites and quotes as a belittlement of the "doctrine" (so-called in *Dean*) as "at most..." serving "to emphasize 'under the circumstances' ", proceeds after the quoted portion to devote the rest of the opinion to a detailed application of the doctrine to the facts of the case. *Jackson v. Indiana Lumbermen's Mutual Ins. Co.*, 175 So.2d 349l (La. App. 2d. Cir. 1965), which the Fifth Circuit cites as in "accord" with *Dean's* belittlement, actually merely cites the *Dean* case as authority for application of the doctrine.

curate, evidence supported, and properly requested charge avoids error only if the subject matter of the requested charge is accurately presented by the charge actually given. *Lind v. Aetna Casualty and Surety Co.*, 374 F.2d 377 (5th Cir. 1967); *Marshall v. Insthmian Lines, Inc.*, 334 F.2d 131 (5th Cir. 1964); *Bolden v. Kansas City Southern Railway Co.*, 468 F.2d 580 (5th Cir. 1972); *United States v. Lewis*, 592 F.2d 1282 (5th Cir. 1979); *United States v. Goss*, 650 F.2d 1336 (5th Cir. 1981).

In the instant case, the Court of Appeals held that the substance of the requested charge was adequately conveyed by a boilerplate negligence charge. As the dissent of Judge Garwood put it:

> The majority opinion rests on the history that the general charge adequately covered the matter because it contained the standard definitions that negligence was "the failure to use ordinary care under the circumstances" and that ordinary care "must be viewed in the light of all the surrounding circumstances" [emphasis added]. Of course, such or similar general definitions are given in nearly every negligence case, whether or not there is any question of sudden emergency. The majority opinion is therefore in effect holding that a sudden emergency instruction need never be given.
>
> The majority rationale is that conceptually a sudden emergency is a circumstance, and hence is adequately covered by a plain vanilla "under the circumstances" charge. A certain logical force here cannot be doubted, but, to borrow long familiar phrases, "[u]pon this point a page of

> history is worth a volume of logic," *New York Trust Co. v. Eisner,* 256 U.S. 345, 349, 41 S.Ct. 506, 507, 65 L.Ed. 963 (1921), or, as Justice Holmes said on another occasion, "[t]he life of the law has not been logic: it has been experience." O. Holmes, The Common Law (1881).
>
> 578 F.2d 1325 at 1329.

The reasoning of the Court of Appeals attempts to constrain experience in a straight jacket of exaggerated logic and abstraction; it is justification of the reduction of particular and helpful language to useless generality. It is a form of "nothing-buttery", a fiat that henceforth, in the Fifth Circuit the doctrine of sudden emergency, which the courts of the states have seen fit to elaborate in such detail, is "nothing but" a superfluous variant of "under the circumstances." Further quoting Judge Garwood:

> As "sudden emergency" is an old doctrine almost universally accepted in negligence cases by the courts of Louisiana and the rest of our nation, we must assume that experience has proved its utility to judges and juries in the disposition of these cases. While in a conceptual or theoretical sense, the general "under the circumstances" rubric may be broad enough to encompass "sudden emergency," it is evident that in the practical task of deciding negligence cases it has been found helpful and useful, to both fact finders and law appliers, to group in a separate, special class those cases which involve sudden emergencies. Such an emergency is, of course, a circumstance, but it is one that experience teaches is sufficiently different from other classes of circumstances to warrant, as a practical matter, the special

> focus and highlighting which is afforded by the doctrine of sudden emergency. It aids the process of decision making for the judge and jury to be cautioned to pause a minute and in effect remind themselves, if this is a sudden emergency then we should not expect from the actor quite as much as we normally would, because this is a *special* circumstance. (Emphasis in original)
>
> 578 F.2d, at 1329.

It is true that in a strictly logical sense the boilerplate negligence charge comprehends the more particular sudden emergency charge; but only in the sense that a hypothetical jury charge to "Go out and do justice by both sides" comprehends the law in its totality. Such a general charge is, in the abstract, correct; but it fails to inform the juror's mind of those concrete indices, rooted in experience, that are the very purpose of reliance on rules of law, rather than on an untutored and unguided "sense of justice".

This index, "doctrine", "rule" or "element of the law"—the sudden emergency doctrine—is an integral part of the substantive law, of such importance that at least one Louisiana intermediate court has called it an "affirmative defense". *Fontana v. State Farm Mutual Automobile Insurance Co.*, 173 So. 2d 284 (La. App. 3d Cir., 1965), *writ denied*, 247 La. 1027; 175 So. 2d 644 (La. 1965). Nonetheless, the Court of Appeals in these proceedings has held "in effect...that a sudden emergency doctrine need never be given "in the Fifth Circut."[3] Dissenting Opinion, 678 F.2d at

[3] Arguably, the decision below also tolls the death-knell for jury charges on every other particularization of the general law of negligence,

1328. With respect at least to jury charges, this amounts to no less than an abrogation of state law. It is submitted that such an abrogation of a part of state law as a candidate for inclusion in jury charges will surely tend to determine different outcomes in the federal courts than would result in a state court for the Fifth Circuit.

The Fifth Circuit's decision below is in conflict with the decisions of at least three other circuits that have dealt with the issue. See *Cavallaro v Williams*, 530 F.2d 473 (3d Cir., 1975); *Hasselbrink v Spellman*, 246 F.2d 34 (6th Cir., 1957); *Chandler v Edward W. Long, Inc.*, 623 F.2d 1139 (6th Cir., 1980); *Heerman v Burke*, 266 F.2d 935 (8th Cir., 1959); *Stains v Jones*, 500 F.2d 1233 (8th Cir., 1974); *Hopkins v Metcalf*, 435 F.2d 123 (10th Cir., 1970); *Long v Hank*, 457 F.2d 40 (10th Cir., 1972). This conflict between the circuits calls for resolutory review by this Honorable Court.

(Footnote 3 continued)
e.g., last clear chance, age of the tort-feasor, etc. Further, one may infer conversely that the erroneous *giving* of a sudden emergency or similar charge will not be reversible in the Fifth Circuit.

Respectfully submitted,

SALVADOR ANZELMO
CITY ATTORNEY FOR THE
CITY OF NEW ORLEANS

GALEN S. BROWN
DEPUTY CITY ATTORNEY
1300 PERDIDO STREET
ROOM 2W13 - CITY HALL
NEW ORLEANS, LOUISIANA 70112
PHONE: (504) 586-4651

ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I, GALEN S. BROWN, hereby certify that I have on November ____, 1982, by United States Mail, postage prepaid, served three (3) copies of the foregoing petition upon all parties required to be served, their names and address being as follows:

JOEL MARTIN
through his counsel of record
Terrence J. Lestelle
717 St. Charles Avenue
New Orleans, Louisiana 70130

-and-

JACOB A. AMATO
Amato & Creely
A Professional Law Corporation
901 Derbigny Street
Post Office Box 441
Gretna, Louisiana 70054-0441

_____
GALEN S. BROWN

APPENDIX "A"

Joel W. MARTIN, Plaintiff-Appellee,

v.

CITY OF NEW ORLEANS and David Michell, Defendants-Appellants.

No. 81-3277.

United States Court of Appeals, Fifth Circuit.

June 25, 1982.

Plaintiff brought action against police officer and city to recover for injuries sustained when he was struck in the back of the neck with a bullet from officer's revolver. The United States District Court for the Eastern District of Louisiana, Patrick E. Carr, J., entered judgment for plaintiff, and defendants appealed. The Court of Appeals, Jerre S. Williams, Circuit Judge, held that: (1) trial court did not err in refusing to submit defendant's requested instruction on the doctrine of sudden emergency, since trial court's charge conveyed to jury the essence of sudden emergency doctrine, because all of the facts giving rise to the emergency were before the jury and jury was instructed to evaluate defendant's conduct in light of those circumstances, and (2) award of $500,000 to plaintiff, who was struck in the back of the neck with a bullet from defendant police officer's revolver, who was fearful of future complications arising out of the fact that it was too dangerous to remove the bullet, and who risked future

complications, the consequences of which could be life-threatening, was not excessive.

Affirmed.

Garwood, Circuit Judge, dissented and filed opinion.

1. Federal Courts 637

In action to recover for injuries sustained by plaintiff when he was shot by defendant policeman, policeman's blanket objection to trial court's instructions was sufficient to preserve appeal from trial court's failure to submit his requested instruction on the sudden emergency doctrine, since trial court told policeman's counsel that he would not listen to any argument and that merely stating an objection would be sufficient.

2. Federal Civil Procedure 2182

In reviewing alleged errors in jury charges, reviewing court must look at the charge as a whole to determine whether it fairly and adequately apprised jury of the applicable law and its duty to resolve the issues thereunder; if charge leaves reviewing court with substantial and ineradicable doubt as to whether jury was properly guided in its deliberations, it cannot stand.

3. Federal Civil Procedure 2176.3

A party does not have the right to have any particular charge read to jury even if its requested charge is a correct statement of law, and when a specific instruction requested by party is substantially covered by court's charge there is no error.

4. Negligence 12

The doctrine of sudden emergency does not invoke a different standard of care from that applied in any other negligence case; the conduct required is still that of a reasonable person under the circumstances, and the emergency is merely a circumstance to be considered in assessing the actor's conduct.

5. Federal Civil Procedure 2176.3

In action to recover for injuries sustained when plaintiff was shot by defendant policeman, trial court did not err in refusing to submit defendant's requested instruction on the doctrine of sudden emergency, since trial court's charge conveyed to jury the essence of sudden emergency doctrine, because all of the facts giving rise to the emergency were before the jury and jury was instructed to evaluate defendant's conduct in light of those circumstances.

6. Damages 87(1)

Under Louisiana law, the right of recovery in personal injury cases is limited to actual and compensatory damages and does not extend to speculative or punitive damages.

7. Damages 87(1)

Award of $500,000 to plaintiff who was struck in the back of the neck with a bullet from defendant police officer's revolver was not shown to have been speculative or punitive.

8. Federal Courts 872

Appellate court will not reverse jury verdict for excessiveness except on the strongest of showings.

9. Federal Courts 872

Because the size of award is primarily a question of fact, reviewing courts are exceedingly hesitant to overturn the decision of jury, especially when trial judge has approved the award.

10. Federal Courts 872

Reviewing court will reverse an award for excessiveness only when it is so gross as to be contrary to

right reason, or when it clearly exceeds that amount that any reasonable man could feel claimant is entitled to, and even if reviewing court strongly disagrees with the amount of the award, it may not reverse it as long as it meets those standards.

11. Damages 132(1)

Award of $500,000 to plaintiff, who was struck in the back of the neck with a bullet from defendant police officer's revolver, who was fearful of future complications arising out of the fact that it was too dangerous to remove the bullet, and who risked future complications, the consequences of which could be life-threatening, was not excessive.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before GOLDBERG, WILLIAMS and GARWOOD, Circuit Judges.

JERRE S. WILLIAMS, Circuit Judge.

In the early morning hours of October 6, 1979, plaintiff-appellee Joel Martin was walking through the French Quarter in New Orleans, Louisiana with his girlfriend, his brother, and a few of his brother's friends. He was standing on Bourbon Street at the corner of Bien-

ville when suddenly he was struck in the back of the neck with what he later discovered to be a bullet from the revolver of New Orleans policeman David Michell, the defendant-appellant.

Martin filed suit against Officer Michell and the New Orleans Police Department alleging that Michell had acted negligently in allowing his gun to discharge in a crowded area. Because Michell was acting within the course and scope of his employment as a policeman, Martin alleged, the Police Department was vicariously liable for Michell's negligence. Jurisdiction was based upon diversity of citizenship because Martin was a citizen of Kentucky.

On the evening of October 5, 1979, Officer Michell had been patrolling the French Quarter. He received a report over his radio informing him that a late model red Pontiac was careening through the Quarter and had just struck a mounted policeman. Moments later Michell was at the intersection of Bourbon and Conti Streets when he noticed a red Pontiac proceeding recklessly down Conti. The vehicle nearly hit another policeman, Robert Williams, several pedestrians, and Officer Michell. The Pontiac continued down Conti and then turned right at the next corner onto Royal Street. Anticipating that the driver would take a route around the block, Michell ran up Bourbon Street toward Bienville Street to await the return of the Pontiac. As Michell had guessed, the vehicle turned right from Royal onto Bienville and headed back toward Bourbon Street. Standing on Bienville, just before the Bourbon

Street intersection, Officer Michell, by gesture and by standing in the street, ordered the driver of the Pontiac to halt. The driver ignored Michell and continued straight ahead almost running him down. At this point in the story, Michell's account of the subsequent events differs from the account given by witnesses for Martin.

Michell testified that he jumped out of the car's path and ran around to the passenger side of the vehicle. When he had observed the Pontiac earlier, Michell thought he had seen two people in the car, but now he saw the driver only. He claimed that he then drew his revolver, approached the front passenger side door, and leaned into the window wot see whether the other person was hiding in the back seat. The driver grabbed Michell's revolver and in their struggle, the gun went off.

Betsy Buie and Judy Moscovitc, two of Martin's companions that evening, were standing on Bourbon Street at the Bienville Street intersection just behind the Bourbon Street barricade when the incident took place. Although they were on the driver's side of the Pontiac, they testified that because they were behind the car, they could see clearly everything that happened on the passenger side. They contended that Michell approached athe passenger side, drew his revolver, and using both hands, fired into the open window of the car. They stated unequivocally that Michell was standing completely outside of the car and that at no time did he lean into the car.

After the shot was fired, Martin grabbed the back of his head and sank to his knees. His testimony at trial indicated that at first he did not realize what had happened; he thought he might have been struck by a blunt object. But, almost instantly he was bleeding profusely. His companions rushed over to help him, but no one was able to stop the bleeding. A few minutes later, he was helped into a police squad car and taken to Charity Hospital.

Doctors at the hospital found that he had been shot and that the bullet and several bullet fragments had lodged in the soft tissue at the base of Martin's head and top of his neck. Because it was so close to the spinal cord, the doctors decided it would be too dangerous to remove the bullet. Martin had no other symptoms or complications at that time and was released from the hospital three days later.

Since the incident, Martin has experienced only minimal physical discomfort. Occasionally his neck becomes tired and sore when he remains in one position for a long time. He testified that he continues to suffer emotionally because he is constantly aware of the bullet's presence, and he fears the possibility of future complications.

Two neurosurgeons who had examined Martin testified as to the extent of his injuries and his prognosis. Both testified that Martin's injury was healing well without complications. Because the bullet and its fragments remained in his neck, however, there would always be a risk

of complications such as infection, arteriovenous fistula, and increased pain. If the bullet or fragments migrated to the spinal cord, Martin could become partially or totally paralyzed. Corrective surgery for any of these conditions would be dangerous and expensive. The doctors concluded that while the chance that Martin would experience these complications was small, the consequences were serious.

The case was submitted to the jury upon special interrogatories. They found that police officer Michell was negligent in the discharge of his gun and wounding of plaintiff, and that his negligence was a proximate cause of Martin's injury. Martin was awarded $500,000.00. The court entered judgment in that amount.

In this appeal, Michell contends that the court committed reversible error in refusing to submit hs requested jury instruction concerning the sudden emergency doctrine as a defense to the claim of negligence. Alternatively, he argues that the $500,000.00 award cannot stand because it is punitive, speculative, and unsupported by the evidence. We find his contentions unpersuasive and affirm on both issues.

SUDDEN EMERGENCY DOCTRINE

Michell's first point on appeal is that the court erred in refusing to instruct the jury on the sudden emergency doctrine. That doctrine has been defined by the Louisiana Supreme Court in these words:

> One who suddenly finds himself in a position of imminent peril, without sufficient time to consider and weigh all the circumstances or best means that may be adopted to avoid an impending danger, is not guilty of negligence if he fails to adopt what subsequently and upon reflection may appear to have been a better method, unless the emergency in which he finds himself is brought about by his own negligence.

Hickman v. Southern Pacific Transport Co., 262 La. 102, 262 So.2d 385, 389 (1972). Michell argues that the doctrine was applicable to the facts of this case because recklessness of the driver of the automobile, including the attempt to run him down, put him into a position of imminent peril. Martin contends that Michell waived his right to appeal this issue because he failed to make a specific objection to the court's charge and, in the alternative, that the charge gave an instruction substantially equivalent to the sudden emergency doctrine. We find that the issue was not waived by Michell but that the court's charge sufficiently instructed the jury as to the applicable principles of law.

[1] Prior to trial, both parties submitted proposed charges and special interrogatories to the court. Michell's Requested Jury Charge No. 7 contained the sudden emergency doctrine in the above-quoted language with a citation to the *Hickman* case. The court drew up its own charge and gave each party an opportunity to object to any alleged errors in the charge. Martin's counsel posed his objections first. He offered citations in support of his objections but the court refused to consider them saying "Don't

give me any argument, just put your objection in, that will protect you." The court then asked Michell's counsel for his objections and he replied, "We would like to enter into the record our objection for the Court not using our jury charges one through nine."

We find Michell's blanket objection was sufficient to preserve an appeal from the court's failure to use his Requested Jury Charge No. 7. Fed.R.Civ.P. 51 requires that a party objecting to a proposed jury charge must state "distinctly the matter to which he objects and the grounds of his objection." The rules does not require formality; rather, its purpose is to inform the trial judge of his possible errors so that he may have a chance to correct them. *Kroger Co. v. Roadrunner Transportation, Inc.*, 634 F.2d 228, 229-30 (5th Cir. 1981); 5A Moore's Federal Practice, § 51.04 (1982). Here, the trial court told counsel that he would not listen to any argument and that merely stating an objection would be sufficient. Under these circumstances, we find that Michell's counsel adequately informed the court of his objection to its failure to include the sudden emergency doctrine in the charge. Therefore, the issue is properly before us in this appeal.

[2,3] In reviewing alleged errors in jury charges, we must look at the charge as a whole to determine whether it fairly and adequately apprised the jury of the applicable law and its duty to resolve the issues thereunder. *Smith v. Borg-Warner Corp.*, 626 F.2d 384, 386 (5th Cir. 1980). If the charge leaves the reviewing court with "substantial and in-

eradicable doubt as to whether the jury has been properly guided in its deliberations" it cannot stand. *Dwoskin v. Rollins, Inc.*, 634 F.2d 285, 293 (5th Cir. 1981). A party does not have a right to have any particular charge read to the jury even if its requested charge is a correct statement of the law. *Ullman v. Overnite Transportation Co.*, 563 F.2d 152, 157 (5th Cir. 1977). And when a specific instruction requested by a party is substantially covered by the court's charge, there is no error. *McCullough v. Beech Aircraft Corp.*, 587 F.2d 754, 759 & n.9 (5th Cir. 1979). Having reviewed the entire charge we find that, in its own words it adequately instructed the jury on the issue of sudden emergency.

[4] The doctrine of sudden emergency does not invoke a different standard of care than that applied in any other negligence case. The conduct required is still that of a reasonable person under the circumstances. The emergency is merely a circumstance to be considered in assessing the actor's conduct. W. Prosser, *Law of Torts*, Ch. 5 § 33 at pp. 168-70 (1971). As the Louisiana Court of Appeals has explained, "This characterization lends little or nothing to the determination of negligence and in no way modifies the standard tests. Sudden emergency is certainly no absolute defense and we must still ask the question: 'Was the conduct in question reasonable under the circumstances?' At most, reference to 'sudden emergency' serves to emphasize 'under the circumstances.' " *Dean v. Travelers Insurance Co.*, 171 So.2d 708, 709 (La.App.1965) (finding that a person acted negligently in letting go of the steering wheel

even though she had been confronted with a sudden emergency). *Accord, Jackson v. Indiana Lumbermen's Mutual Insurance Co.*, 175 So.2d 349, 350 (La.App.1965). *Cf. Hickman*, 262 So.2d at 389 (motorcyclist acted reasonably when confronted by a sudden emergency not brought about by his own negligence).

[5] We find that the court below adequately charged the jury on this issue. Although it never spoke in terms of "emergency" or "imminent peril," the court instructed the jury to consider all the surrounding circumstances when determining whether Michell's conduct was negligent. The jury was told that negligence is "the failure to use ordinary care under the circumstances" and that "ordinary care is not an absolute term, but a relative one. That is to say, in deciding whether ordinary care was exercised in a given case, the conduct in question must be viewed in the light of all the surrounding circumstances, as shown by the evidence in the case."

The jury had heard the testimony from three policemen concerning the dangers posed by the reckless driver of the Pontiac. Two of Martin's witnesses testified that the driver did indeed try to run down Michell. This evidence was undisputed. Further, Michell testified that he leaned into the car in an attempt to stop the driver and that the driver grabbed his gun. Thus, all of the facts giving rise to the emergency[1] were before the jury and the jury was in-

[1] Martin also argues that the doctrine is inapplicable to the facts of this case as a matter of law. He contends that there was no emergency until Michell negligently threw himself in front of, and then into, the

structed to evaluate Michell's conduct in light of these circumstances. Arguably, a specific charge on the doctrine of sudden emergency would have been preferable. Our duty as an appellate court, however, is to ensure that the charge is fair and adequate. We conclude that the charge met this standard.

THE AWARD

Michell contends that the $500,000 award was speculative, punitive, and excessive in light of the evidence. He asks us to reverse the judgment or, in the alternative, to order a remittitur. We hold that the award was neither speculative nor punitive. Nor do we find it excessive, requiring reversal or remittitur.

[6,7] Under Louisiana law, the right of recovery in personal injury cases is limited to actual and compensatory damages and does not extend to speculative or punitive damages. *Breaux v. Simon*, 235 La. 453, 104 So.2d 168 (1958). Michell asserts, with absolutely no factual elaboration, that the $500,000 award was speculative and punitive. There is no indication that this is the case. Martin never requested punitive or speculative damages, and his

---

(Footnote 1 continued)
Pontiac. Because the doctrine can not apply to one who negligently brings about the perilous situation, *Hickman*, 262 So.2d at 389, the court, it is argued, was correct in refusing to instruct the jury on the doctrine. We need not consider the merits of this argument, however, because we conclude that the court's charge conveyed to the jury the essence of the sudden emergency doctrine, although not in the words requested by Michell.

counsel's argument did not suggest that such an award would be proper. The trial court specifically instructed the jury that the award could not be punitive or speculative and that the damages had to be established by reasonable, credible evidence, not by remote or speculative proof. The court listed the items for which Martin could recover as including (1) physical pain and suffering, past and future; (2) mental anguish and mental suffering, past and future; (3) permanent residual disability; and (4) reasonable medical expenses, past and future. We find the jury was adequately instructed as to punitive and speculative damages, and we find no grounds for reversal on this issue.

[8-10] Michell then argues that the award was excessive. He asks us to reverse the judgment or order a remittitur. It is firmly established that an appellate court will not reverse a jury verdict for excessiveness except on "the strongest of showings." *Bridges v. Groendyke Transport, Inc.*, 553 F.2d 877, 880 (5th Cir. 1977). Because the size of the award is primarily a question of fact, we are exceedingly hesitant to overturn the decision of a jury, especially when the trial judge has approved the award. *Shows v. Jamison Bedding, Inc.*, 671 F.2d 927, 933 (5th Cir. 1982). We will reverse an award for excessiveness only when it is "so gross...as to be contrary to right reason," *Bailey v. Southern Pacific Transportation Co.*, 613 F.2d 1385, 1391 (5th Cir. 1980), *cert. denied*, 449 U.S. 836, 101 S.Ct. 109, 66 L.Ed.2d 42 (1980), or when it "clearly exceeds that amount that *any* reasonable man could feel the claimant is entitled to." *Shows, supra* at 934 quoting *Bridges,*

supra at 880 (emphasis in original). Even if we strongly disagree with the amount of the award, we may not reverse it as long as it meets these standards. *Shows, supra* at 934.

[11] Michell contends that a review of the evidence shows that the $500,000 award was clearly excessive. In support of his argument he emphasizes the following evidence: (1) Martin's medical expenses totalled only $319.46; (2) no surgery was performed and none was indicated at the time of trial; (3) Martin has lost no wages as a result of the injury; (4) Martin experiences only minor physical discomfort; (5) his prognosis was generally good; (6) he has experienced no complications since the injury; and (7) his neurological exams were normal.

But, as Martin points out, that was not all the evidence. There was medical testimony concerning the adverse psychological effects experienced by people who retain foreign objects, such as glass or bullets, in their bodies after an accident. Martin testified that he is constantly awre of the presence of the bullet and fearful of future complications. And, while the doctors did state that Martin's prognosis was good, they also testified that there would always be some risk of future complications, and that the consequences could be life-threatening. Because he has only one day in court, he must collect now for any losses that may occur in the future. The relatively small amount of medical expenses incurred by Martin has little bearing standing alone. In this case, there was persuasive reason for low medical expense; the reason Martin did not

incur the expense of surgery was because surgery was considered to be too dangerous. Thus far, given the nature of the injury, Martin has been fortunate. His wound healed normally and he has not suffered serious physical disabilities as a result of the injury. Still, Martin must go through life (he is in his 20s) with a bullet lodged in the back of his neck, a fraction of an inch from his spinal cord. In light of this emotional burden and the serious physical risks he will always have, we cannot say that $500,000 is "contrary to right reason," *Bailey, supra* at 1391, or in excess of the amount that "*any* reasonable man could feed [Martin] was entitled to." *Shows, supra* at 934. Because we find that the verdict was not excessive, we do not reverse or reduce it.

CONCLUSION

The court below adequately instructed the jury on all the relevant issues, including the sudden emergency doctrine. We hold that the verdict is not excessive in light of the evidence. The judgment of the district court is

AFFIRMED.

GARWOOD, Circuit Judge, dissenting:

I respectfully dissent. In my opinion the trial court committed reversible error in refusing defendant's request for an instruction on sudden emergency. It is undisputed that the requested instruction was a fair and correct state-

ment of the applicable Louisiana law, and it is clear from the facts recited in the majority opinion that the question of sudden emergency was raised by the evidence.[1]

The majority opinion rests on the theory that the general charge adequately covered the matter because it contained the standard definitions that negligence was "the failure to use ordinary care *under the circumstances*" and that ordinary care "must be viewed in the light of *all the surrounding circumstances*" [emphasis added]. Of course, such or similar general definitions are given in nearly every negligence case, whether or not there is any question of sudden emergency. The majority opinion is therefore in effect holding that a sudden emergency instruction need *never* be given.

The majority rationale is that conceptually a sudden emergency is a circumstance, and hence is adequately covered by a plain vanilla "under the circumstances" charge. A certain logical force here cannot be doubted, but, to borrow long familiar phrases, "[u]pon this point a page of history is worth a volume of logic," *New York Trust Co. v. Eisner*, 256 U.S. 345, 349, 41 S.Ct. 506, 507, 65 L.Ed. 963

[1] As observed in footnote one of the majority opinion, appellee contends that the sudden emergency charge would have been improper because the doctrine does not apply to one who negligently brings about the perilous situation. This matter was covered in the requested instruction. Under the evidence here, whether Michell was negligent and, if so, whether the sudden emergency was caused by such negligence were clearly fact questions for the jury. Accordingly, appellee's contentions in this regard present no justification for the trial court's refusal to instruct on sudden emergency. *See Long v. Hank*, 457 F.2d 40 (10th Cir. 1972).

(1921), or, as Justice Holmes said on another occasion, "[t]he life of the law has not been logic: it has been experience." O. Holmes, The Common Law (1881).

In *Hickman v. Southern Pacific Transport Company*, 262 La. 102, 262, So.2d 385, 389 (1972), the Louisiana Supreme Court, in discussing the sudden emergency doctrine, correctly observes that:

> "The principle embodied in this rule enjoys *almost universal acceptance in the courts of the nation, founded* as it is *upon* common sense and a *proper recognition of prudent standards in human conduct.* 65A C.J.S. Negligence § 123; 57 Am.Jur.2d, Negligence, § 90. The rule applies to the defendant's as well as the plaintiff's conduct; it is therefore, *appropriate in a consideration of fault* as it bears upon contributory negligence." [Emphasis added.]

The court in *Hickman* decided the case before it expressly upon this doctrine: "Applying the doctrine of sudden emergency to Iles' [plaintiff's] conduct, we conclude...Iles was not, therefore, contributorily negligent." [*Id.* at 389.] Other Louisiana cases are similar. For example, in *McMullan v. Allstate Insurance Company*, 242 So.2d 921 (La.App. 1st Cir.), *writ denied*, 257 La. 990, 224 So.2d 859 (1971), the trial court ruled in favor of the defendant because it "found that both drivers were faced with a sudden emergency, acted accordingly, and were not negligent." [*Id.* at 923.] On appeal, the judgment was affirmed, the court quoting with approval from the opinion in

Bautista v. Maryland Casualty Company, 201 So.2d 122, 124 (La.App. 4th Cir. 1967), in part as follows:

> " '...similar to the doctrine of last clear chance, or discovered peril, sudden emergency is *an element of the law of negligence which* may be *considered and evaluated by the trier of fact* in reaching a conclusion relative to the standard or degree of care required of the defendant and the breach thereof under the individual facts of the particular case.' " [242 So.2d at 924; emphasis added.][2]

As "sudden emergency" in an old doctrine almost universally accepted in negligence cases by the courts of Louisiana and the rest of our nation, we must assume that experience has proved its utility to judges and juries in the disposition of these cases. While in a conceptual or theoretical sense, the general "under the circumstances" rubric may be broad enough to encompass "sudden emergency," it is evident that in the practical task of

---

[2] In *Alvis v. Davis*, 295 So.2d 48 (La.App. 2d Cir.), *writ denied*, 295 So.2d 446 (1974), the "trial court found that defendant was confronted with a sudden emergency, that he reacted reasonably in the face of the situation, and thus was not negligent." [*Id.* at 49.] The judgment was affirmed, and the court quoted with approval from the *Bautista* opinion, including the passage set out above in the text. [295 So.2d at 50.]

In *Fontana v. State Farm Mut. Auto. Ins. Co.*, 173 So.2d 284 (La.App. 3d Cir.) *writ denied, 247 La. 1027, 175 So.2d 644 (1965), the court, in an opinion by Judge tate, now of this Court, held that sudden emergency was a defense which had to be affirmatively pleaded. The courts in Bautista, McMullan* and *Alvis* have rejected this view, holding that sudden emergency, like discovered peril, can come in under a general denial. So far as the writer has discovered, the Louisiana Supreme Court has not resolved this dispute. In federal court, the doctrine need not be specially pleaded. *Hopkins v. Metcalf*, 435 F.2d 123 (10th Cir. 1970).

deciding negligence cases it has been found helpful and useful, to both fact finders and law appliers, to group in a separate, special class those cases which involve sudden emergencies. Such an emergency is, of course, a circumstance, but it is one that experience teaches is sufficiently different from other classes of circumstances to warrant, as a practical matter, the special focus and highlighting which is afforded by the doctrine of sudden emergency. It aids the process of decision making for the judge and jury to be cautioned to pause a minute and in effect remind themselves, if this is a sudden emergency then we should not expect from the actor quite as much as we normally would, because this is a *special* circumstance.

I am aware of no decision of this Court holding that, where it is raised by the evidence and proper under applicable law, a requested sudden emergency charge need not be given. Opinions in other circuits seem to point in a contrary direction. In *Hopkins v. Metcalf*, 435 F.2d 123 (10th Cir. 1970), the trial court was reversed for failure to instruct on sudden emergency. In *Chandler v. Edgar W. Long, Inc.*, 623 F.2d 1139, 1141 (6th Cir. 1980), the court stated:

> "We conclude that this testimony presented questions of fact for the jury to determine which *required* the trial judge to instruct the jury on the law of sudden emergency." [Emphasis added.]

In *Sanchez v. Safeway Stores*, 451 F.2d 998, 1000 (10th Cir. 1971), the opinion contains the following in

regard to a sudden emergency instruction: "In our opinion, the instruction was *required* by the evidence and was properly given." [Emphasis added.][3]

The centerpiece of the defense in this case was sudden emergency. By refusing to instruct on this subject, the trial court, in effect, prevented the defense from having its theory of the case adequately presented to the jury.

Our decisions have long recognized that

> "In a proper case, a party may be entitled to have his theory submitted to the jury, when there is evidence to support it and a proper request therefor has been made." *Paramount Film Distributing Corp. v. Applebaum*, 217 F.2d 101, 123 (5th Cir. 1954), *cert. denied*, 349 U.S. 961 [75 S.Ct. 892, 99 L.Ed. 1284] (1955).

Of course, no party has a right to dictate the precise words the trial judge shall use in charging on a given subject or theory, nor to insist that although the trial judge has instructed on the principle involved in his own language, he must also do so again in the words of the party's requested instruction.[4] But these salutory, com-

---

[3] *See also, e.g., Starns v. Jones*, 500 F.2d 1233, 1236-37 (8th Cir. 1974); *Cavallaro v. Williams*, 530 F.2d 473, 478 (3d Cir. 1975); *Long v. Hank*, 457 F.2d 40 (10th Cir. 1972); 3 Devitt and Blackmar, Federal Jury Practice and Instructions § 80.27 (3d ed. 1977).

[4] *See, e.g., McCullough v. Beech Aircraft Corp.*, 587 F.2d 754, 759 n. 9 (5th Cir. 1979);

> "Because the instructions given by the district court covered the principles contained in the refused instructions and were

mon sense rules do not extend so far as to excuse the trial judge, in the face of a proper request, from giving *any instruction* whatsoever on the party's theory, if raised by the evidence. Nor can the trial judge fulfill his obligation in this regard by simply charging in the usual boilerplate generalities. The following opinions of this Court clearly recognize these rules.

In *Bolden v. Kansas City Southern Railway Company*, 468 F.2d 580, 581 (5th Cir. 1972), this Court said:

> "A refusal to give a properly requested instruction supported by the pleadings and the evidence is also error. *Paramount Film Distrib. Corp. v. Applebaum*, 217 F.2d 101 (5th Cir., 1954). It is not error, however, for the court to refuse the *precise* wording of a requested instruction if its *substance* has been adequately covered by the court's charge to the jury." [Emphasis added.]

And the following appears in Judge Rives' opinion for the Court in *Lind v. Aetna Casualty And Surety Company*, 374 F.2d 377, 380 (5th Cir. 1967):

> "If the requested instruction in accord with a party's contention is consistent with the evidence in the case, it *must* be granted unless *the subject matter* has been adequately covered in the court's charge. *Richardson v. Walsh Const. Co.*, 3 Cir., 1964, 334 F.2d 334. Judge Brown pointed out in this Circuit's decision in *Marshall v. Isthmian*

(Footnote 4 continued)

less confusing to the jury than they would have been had the requested instructions been given, the district court did not err in refusing to give the instructions."

> *Lines, Inc.*, 5 Cir., 1964, 334 F.2d 131, that '***it was *not enough to leave the whole thing within the vague contours of a general charge* with the inescapable *boiler-plate instructions on negligence* and the like' ...." [Empahsis added.]

In *United States v. Lewis*, 592 F.2d 1282, 1286 (5th Cir. 1979), approximately the same thought is expressed as follows:

> "We have repeatedly held that 'a defendant is entitled to a charge which precisely and specifically, rather than merely generally or abstractly, points to the theory of his defense', *United States v. Wolfson*, 5 Cir., 1978, 573 F.2d 216, 221; *United States v. Gilbreath, supra*, 452 F.2d [992] at 994; *Perez v. United States*, 5 Cir., 1961, 297 F.2d 12, 16."

Here we have no dispute over precise wording, rather the trial court's instructions wholly failed to touch upon the sudden emergency doctrine in any manner whatsoever. The substance, subject matter and principle of the defendant's theory of the case—sudden emergency—was entirely omitted from the charge. The defendant was relegated to having his theory of the case left "within the vague contours of a general charge" and the "boiler-plate instructions on negligence." As reflected in the cited opinions of Judges Brown and Rives, this "was not enough."

In *United States v. Goss*, 650 F.2d 1336 (5th Cir. 1981), this Court held it was reversible error in a mail fraud case to fail to instruct on good faith. The reasoning of that

opinion is applicable here:

> "The trial judge did charge the jury that a finding of specific intent to defraud is required for conviction. The government urges us to find this sufficient to encompass the good faith defense. Indeed, the trial judge relied on *United States v. Wilkinson*, 460 F.2d 725, 729 (5th Cir. 1972), for the proposition that the giving of the specific intent instruction renders the good faith charge unnecessary.
>
> "*Wilkinson* will not support the weight thus rested on it. In that mail fraud prosecution, the trial judge in fact gave an instruction incorporating the good faith defense, although he refused to couch that instruction in the language of the charge offered by the defendant. Thus, *Wilkinson* does not hold that, if a charge with respect to specific intent is given, then a jury instruction on the defense of good faith is unnecessary. Charging the jury that a finding of specific intent to defraud is required for conviction, while it may generally constitute the negative instruction, *i.e.*, that, if the defendants acted in good faith, they could not have had the specific intent to defraud required for conviction, does not direct the jury's attention to the defense of good faith with sufficient specificity to avoid reversible error." [650 F.2d at 1345.]

Of course, both *Lewis* and *Goss* were criminal cases, but the parties are no less entitled to instructions fairly presenting their theory of the case in civil actions, assuming proper request and adequate support in the evidence.

Since sudden emergency was plainly raised by the

evidence and a proper instruction was requested, I would hold that the trial court committed reversible error by failing to in any way touch on this subject, which was central to defendant's theory of the case, in its instructions.

APPENDIX "B"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 81-3277

JOEL W. MARTIN,
Plaintiff-Appellee,

versus

CITY OF NEW ORLEANS and
DAVID MICHELL,
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Louisiana

---

ON SUGGESTION FOR REHEARING EN BANC

(Opinion June 25, 5 Cir., 1982, __ F.2d __).
(AUGUST 11, 1982)

Before GOLDBERG, WILLIAMS and GARWOOD, Circuit Judges.

PER CURIAM:

(X) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor

Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

Supreme Court, U.S.
FILED
JAN 13 1983
ALEXANDER L. STEVAS
CLERK

NO. 82-890

In the Supreme Court of the United States

OCTOBER TERM, 1982

CITY OF NEW ORLEANS
and
DAVID MICHELL

versus

JOEL W. MARTIN

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TERRENCE J. LESTELLE
717 St. Charles Avenue
New Orleans, Louisiana 70130

JACOB J. AMATO, JR.
AMATO & CREELY
P. O. Box 441
Gretna, Louisiana 70054

COUNSEL FOR RESPONDENT

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i
TABLE OF AUTHORITIES ii
ARGUMENT 1
CERTIFICATE OF SERVICE 7

TABLE OF AUTHORITIES

JUDICIAL OPINIONS **PAGE**

Bern v. Evans,
349 F.2d 282 (8th Cir. 1965) 3

Bolden v. Kansas City Southern Ry. Co.,
468 F.2d 580 (5th Cir. 1972) 4

Chavis v. Finnlines Ltd., O/Y,
576 F.2d 1072 (4th Cir. 1978) 3

Commercial Iron & Metal Co. v. Bache Halsey, Stuart, Inc.
581 F.2d 246 (10th Cir. 1978) 3

Copperweld Steel Co. v. Demag-Mannesmann-Bohler,
578 F.2d 953 (3rd Cir. 1981) 3

Dwoskin v. Rollins, Inc.,
634 F.2d 285 (5th Cir. 1981) 3

E. I. Du Pont De Nemours v. Berkley & Co., Inc.,
620 F.2d 1247 (8th Cir. 1980) 3

Grinder v. Southern Farm Bureau Cas. Ins. Co.,
590 F.2d 741 (8th Cir. 1979) 3

Hickman v. Southern Pacific Transport Co.,
262 La. 102, 262 So.2d 385 (La. 1972) 5

Hopkins v. Jacobsen Mfg. Co.,
592 F.2d 1013 (8th Cir. 1979) 3

Hopkins v. Metcalf,
435 F.2d 123 (10th Cir. 1970) 4

London v. Ryan,
349 So.2d 1334 (La. App. 1st Cir. 1977)
Writ denied, 351 So.2d 171 (La. 1977) 4, 5

Lones v. Detroit, Toledo and Ironton Ry. Co.,
398 F.2d 914 (6th Cir. 1968) Cert. denied,
393 U.S. 1063, 89 S.Ct. 714, 21 L.Ed.2d 705 (1969) 4

Martin v. City of New Orleans,
678 F.2d 1321 (1982) 2

McCullough v. Beech Aircraft Corp.,
587 F.2d 754 (5th Cir. 1979) 3

Pollock v. Koehring Co.,
540 F.2d 425 (9th Cir. 1976) 4

Seltzer v. Chesley,
512 F.2d 1030 (9th Cir. 1975) 4

Smith v. Borg-Warner Corp.,
626 F.2d 384 (5th Cir. 1980) 3

Ullman v. Overnite Transportation Co.,
563 F.2d 152 (5th Cir. 1977) 3

Wright v. Farmers Co-Op of Arkansas and Oklahoma,
620 F.2d 694 (8th Cir. 1979) 3, 4

STATUTES AND RULES

U.S. Sup. Ct. Rule 17, 28 U.S.C.A. 6

Rule 51 Federal Rules of Civil Procedure, 28 U.S.C.A. 4

ARGUMENT

Once again, petitioners urge that the trial court prejudiced their rights by not giving their requested jury charge using the words "sudden emergency".[1]

However, it is submitted that the jury was fairly and sufficiently charged with regard to the applicable law and its duty to resolve the issues thereunder; the jury was not misled, nor were petitioners prejudiced by the refusal to give the requested jury charge.[2]

The Fifth Circuit confirmed this point by stating in its opinion:

> "We find that the court below adequately charged the jury on this issue. Although it never spoke in terms of 'emergency' or 'imminent peril,' the court instructed the jury to consider all surrounding circumstances when determining whether Michell's conduct was negligent. The jury was told that negligence is 'the failure to use ordinary care under the circumstances' and that 'ordinary care is not an absolute term, but a relative one. That is to say, in deciding whether ordinary care was exercised in a given case, the conduct in question must be viewed in the light of all the

[1] Petitioners' argument was rejected twice by the district judge (prior to giving the jury charges and then again in connection with the petitioners' motion for a new trial), and twice by the Fifth Circuit (once on appeal and then in denying petitioners' suggestion for rehearing en banc).

[2] See the opinion at pages A-11 through A-14 of Petition for Writ of Certiorari. 678 F.2d 1321, 1325-1326 (5th Cir. 1982).

surrounding circumstances, as shown by the evidence in the case.' "
Martin v. City of New Orleans, 678 F.2d 1321, 1326 (5th Cir. 1982)

The Fifth Circuit's opinion is not in conflict with the decision of at least three other circuits as petitioners allege. Petitioners attempt to support their argument by citing a very narrow line of cases. (See page 14 of Petition for Writ of Certiorari). All of those cases involved automobile accidents, a factual situation unrelated to the instant case. Petitioners are unable to find cases in other circuits that are factually compatiable with the case at hand. Therefore, it is necessary to examine cases in the various cited circuits that deal with the issue of the standard for evaluating the sufficiency of jury charges.

When viewing the cases from this standpoint, it is clear that the other circuits are not in conflict with the Fifth Circuit since the cases in these circuits hold that a trial judge may use his own language in giving instructions to a jury and cannot be forced to use the particular language of a requested instruction; and that no fault will be found with the given instruction as long as the language used therein adequately, correctly and understandably presents the issues to the jury. Furthermore, when considering alleged errors in jury instructions, the circuit courts cited by petitioners have reviewed the entire jury charge, and if the instructions, when read as a whole, fairly and adequately state the pertinent legal principles involved in the case, the circuit courts have affirmed the court

below. *Wright v. Farmers Co-op of Arkansas and Oklahoma*, 620 F.2d 694, 697-698 (8th Cir. 1980); *Bern v. Evans*, 349 F.2d 282, 290 (8th Cir. 1965); *Grinder v. Southern Farm Bureau Cas. Ins. Co.*, 590 F.2d 741, 743 (8th Cir. 1979); *Chavin v. Finnlines Ltd., O/Y*, 576 F.2d 1072, 1076 and 1084 (4th Cir. 1978); *E. I. Du Pont De Nemours v. Berkley & Co., Inc.*, 602 F.2d 1247, 1270 (8th Cir. 1980); *Copperweld Steel Co. v. Demag-Mannesmann-Bohler*, 578 F.2d 953, 959 (3rd Cir. 1978); *Hopkins v. Jacobsen Mfg. Co.*, 592 F.2d 1013, 1015 (8th Cir. 1979); *Smith v. Borg-Warner Corp.*, 626 F.2d 384, 386 (5th Cir. 1980); *Dwoskin v. Rollins, Inc.*, 634, F.2d 285, 293 (5th Cir. 1981); *Ullman v. Overnite Transportation Co.*, 563 F.2d 152, 157 (5th Cir. 1977); *McCullough v. Beech Aircraft Corp.*, 587 F.2d 754, 759 & n.9 (5th Cir. 1979). In *Commercial Iron & Metal Co. v. Bache Halsey, Stuart, Inc.*, 581 F.2d 246, 250 (10th Cir. 1978), for example, the court succinctly concluded:

> "The instructions met the test of sufficiency for, taken as a whole, they adequately and sufficiently advised the jury of the parties' respective contentions and the law applicable thereto."

While some of the automobile accident cases that petitioners cite hold that a specific charge on "sudden emergency" should have been given, none of these cases indicate that the district courts could not have given a jury charge substantially equivalent to one using the words "sudden emergency".

Moreover, the cases do not conflict on the question

of whether federal or state legal standards should be applied in dealing with this procedural issue of jury instructions. The controlling standard is federal. In *Pollock v. Koehring Co.*, 540 F.2d 425, 426 (9th Cir. 1976), the court stated:

> "Although we look to state law for the correct substance of jury instructions, the question whether an incorrect instruction is prejudicially erroneous is a procedural one requiring application of federal law. *Lones v. Detroit, Toledo and Ironton Ry., Co.*, 398 F.2d 914, 920 (6th Cir. 1968), *cert. denied*, 393 U.S. 1063, 89 S.Ct. 714, 21 L.Ed.2d 705 (1969); accord, *Seltzer v. Chesley*, 512 F.2d 1030, 1035 (9th Cir. 1975); see Rule 51, Fed. R. Civ. P.
>
> Our inquiry is, therefore, whether, looking to the instructions as a whole, the substance of the applicable law was fairly and correctly covered. *Bolden v. Kansas City Southern Ry. Co.*, 468 F.2d 580 (5th Cir. 1972)."

See also, *Hopkins v. Metcalf*, 435 F.2d 123 (10th Cir. 1970); and *Wright v. Farmers Co-Op of Arkansas and Oklahoma*, 620 F.2d 694, 696-697 (8th Cir. 1979) and cases cited therein.

Therefore, although it is unnecessary to address the substantive law issue regarding sudden emergency raised by petitioners in their argument, it is interesting to note their limited statement regarding *London v. Ryan*, 349 So.2d 1334 (La. App. 1st Cir. 1977), *writ denied*, 351 So.2d 171 (La. 1977), the only case cited by petitioners in which

sudden emergency was discussed in the context of an accidental police shooting. Petitioners relate that in that case "a Louisiana court applied the sudden emergency doctrine to an accidental shooting by a police officer." (See p. 9 of Petition for Writ of Certiorari) However, they neglect to mention that the court of appeal found that the trial judge erred in his application of this doctrine to the police shooting since the sudden emergency in which the policemen found themselves was brought about by their own negligence. *London v. Ryan*, 349 So.2d 1334, 1341 (La. App. 1st Cir. 1977), *writ denied*, 351 So.2d 171 (La. 1977). The alleged doctrine of sudden emergency does not apply to one who brings about the perilous or emergency situation by his own negligence. *Hickman v. Southern Pacific Transport Company*, 262 So.2d 385, 389 (La. 1972).[3]

The holding by the Fifth Circuit in this matter does not henceforth preclude, as petitioners would lead the Court to believe, the giving of an instruction on sudden emergency. Surely, the Fifth Circuit did not hold that a sudden emergency charge need never be given as suggested by petitioners. Their argument that this "decision tolls the death-knell for jury charges on every other particularization of the general law of negligence" (page 13-14 of Petition for Writ of Certiorari) is likewise fanciful.

[3] In the instant action, the so-called doctrine of sudden emergency is inapplicable to the facts of this case as a matter of law. Even if this Court was to disregard the testimony of the independent eye witness and view the facts most favorable to plaintiff, the Court would find that there was no emergency until petitioner Michell negligently threw himself in front of and then into a moving vehicle with his gun drawn.

A review on writ of certiorari is not a matter of right, but of judicial discretion. Based on the foregoing, there are no special and important reasons for granting the writ requested by petitioners in this matter. U.S. Sup. Ct. Rule 17, 28 U.S.C.A.

CERTIFICATE OF SERVICE

I, TERRENCE J. LESTELLE, hereby certify that I have on January 10, 1983, by United States Mail, postage prepaid, served three (3) copies of the foregoing petition upon all parties required to be served, their names and addresses being as follows:

CITY OF NEW ORLEANS
and
DAVID MICHELL
through their counsel of record
Salvador Anzelmo
City Attorney for the City of New Orleans
Galen S. Brown
Deputy City Attorney
1300 Perdido Street
Room 2W23 City Hall
New Orleans, Louisiana 70112

TERRENCE J. LESTELLE